**ORAL ARGUMENT – 2/9/00**
**99-0616 & 99-0648**

**IN RE KENNETH GEORGE**
**IN RE EPIC HOLDINGS**

**HONORABLE DOHONEY V. ANDERSON**

YATES: The narrow issue on this mandamus is whether lawyers who are disqualified from working on a case because of the genuine threat that in working on that case they will end up divulging confidences of a former client, whether those lawyers can pass their work-product on to successor counselor.

I need to go back to *Epic*, the mandamus we were here on before. You remember in *Epic* that the old Johnson & Gibbs law firm, that's matter 1, had worked on matter 1 and you remember that last time we called the lawyers at Johnson & Gibbs who actually worked on matter 1, the red guys. And then the lawyers at Johnson & Gibbs who didn't work on matter 1, but were there at the firm are the blue guys. And that's matter 1. That's where they represented my client Epic. And then the red guys and the blue guys leave Johnson & Gibbs and go form a new law firm, which really is two firms, but they got together and I'm going to call them one for this purpose, the Jordan McCool group and it's got red guys and blue guys in it. And the blue guys proceed to sue my client.

In the first mandamus, you honors hold the red guys clear could not sue my client. And because the red guys cannot sue my client, the blue guys are precluded from suing my client, and the firms are disqualified. Now why were the blue guys precluded? They were precluded under Rule 109. But the reason for that is your re-rebuttable presumption that your honors raised in cases like *Henderson v. Floyd*, and *Texaco v. Garcia*, where you say that if a lawyer in the firm has the confidences, then other lawyers in the firm are irrebuttably presumed to also have the confidences and, therefore, the blue guys were irrebuttably presumed to have the confidences and that's why they couldn't work on the matter. So the question here is, if the blue guys couldn't work on the matter can the blue guys send their work product over to the new law firm?

ABBOTT: Isn't the real problem though what is contained in the little suitcase?

LAWYER: That is the question. We would say under cases like the court(?) case, which is one of the ones that we cite, that what you have to say is that if the blue lawyers themselves couldn't work on it, then the taint necessarily the confidences necessarily seep into the work product.

ABBOTT: Do you know what all is contained in the suitcase?

LAWYER: No, sir, I do not.

ABBOTT: What if one of the items in there are summaries of depositions that were taken. Is there any problem with them shipping that over to the new lawyers?

LAWYER: You hit on the exact point that's a trouble - to me the only troublesome issue here is where do you draw the line on what you would let go? To me, it's very clear.

ABBOTT: Would you agree that the appropriate test would be the balancing test used by the federal courts?

LAWYER: I do not. I know that the law review articles have written it that way, but I think the dissent in the *First Wisconsin* case has got it right.

ABBOTT: So you think that even deposition summaries should not go?

LAWYER: I think the way a lawyer writes up a deposition summary may very well be impacted by confidences and information that he has previously, and that is work product. And there is two kinds of work product going on in this case and that's where I think some of the cases get confused. You have work product for evidentiary privilege purposes. It could be core work product. It could be non-core work product, ie. what is privilege. But we know that confidences for purposes of protection under the ethical rules is more than just what's privileged. The DR's say that. They define confidences as beyond what's privilege. And your honors have written that in *in re American Home* and in *Phoenix Founders*.

ABBOTT: But it's a fair presumption that much of what's contained in the work product suitcase is untainted in any respect.

LAWYER: Would you agree with me that it's also true that it would also be a presumption that much of what's in the briefcase is tainted? Core work product. The impressions of the lawyer. His game plan. I mean one of my partners said it's like saying the blue guys can't coach the game but they can send their game book over to the new guys.

ABBOTT: I can see the argument that if they sent the game book over, which was focused upon the confidences that they knew that they should have not have known, then that's going to be problematic. But I don't see why that should also prohibit the transfer of work that was done that could involve literally hundreds if not thousands of hours of work done perhaps even by people other than these lawyers, such as, deposition summaries, legal memorandums concerning legal issues in the case that don't touch upon anything that may involve the confidences, just regular legal...

LAWYER: For purposes of the disqualification, we don't go in and draw those kind of

lines do we. We assume that all the work that the blue guys did is _____ or tainted with the confidence. Right?

PHILLIPS: You can't leave a lawyer in for purpose of sending a deposition notice but another lawyer for the purpose of taking the deposition. That's a different line than this one.

LAWYER: I absolutely agree with you. And that gets to my point about where do you draw the line. The dissent in *First Wisconsin* and the court in the *Rearding* case, I think, suggest a good place to draw the line, which is first of all you say, we're only talking about a situation where the disqualification is because of a threat of confidences. This is my Tab 2, my pie chart. There are a lot of reasons why lawyers get disqualified. But I'm only in this piece of the pie, the part of the pie where a lawyer is disqualified, the red slice, because of a threat of confidences.

BAKER: The court held that the real issue in the first Epic was, disparagement of work product - part (a)(1), which had never been written on by this court before. And granted that the discussion does talk about the rest of Rule 109 vis-a-vis the presumption of confidences exchanged. But what disturbs me is why did you ask for in the TC that started this the prohibition of the new counsel from seeing even the record of the first three week trial to review the order that Judge Tyson made requiring you to turn over privilege and confidential documents as the discovery request, and things like that?

LAWYER: We've abandoned our position on the record, because part of what I would say the rule should be is that if matters are in the public domain, because we could have moved to seal that record, we didn't do that, so we would say they get that.

BAKER: That gets me to the waiver question.

LAWYER: We would also say that as the Chief has pointed out, there is a place where you have to draw the line. The place where you would draw it would be as suggested in the dissent in *First Wisconsin* and in *Rearden*, what are the documents that are the bottom line necessary things for the subsequent counsel to understand the case? And in *Rearden* they say, that's the pleadings, that would be the deposition notices and the responses. And we've stipulated in this case that they can have the discovery. The related federal court cases, we've stipulated, let them have the discovery.

BAKER: But your first position when you were in the TC was to seal the record of the first trial?

LAWYER: We came too late to that.

BAKER: I understand that. That gets me to the waiver question. Every case that you

rely on in this court, except for one, shows that the issue of the work product was litigated at the same time that the disqualification proceeding was going on. And in every one of those cases, the issue of no work product being transferred was raised when the first go around on disqualification. Now how can you avoid the assertion by the other side that there was waiver?

LAWYER: The Dallas CA wrote that. But that's just flat not true. It is not true that in every one of the cases that's cited...

BAKER: I said everyone but one.

LAWYER: We can give you a chart. We've done a chart and divided up the cases.

BAKER: Every case that you relied on was decided 1992 or before this particular area. So how did you not know what the law was on bringing up a work product claim at the same time of the disqualification hearing?

LAWYER: We are here today because it's not clear whether or not work product would go. But we didn't know that they were for sure going to be disqualified.

BAKER: That doesn't seem to be anybody's concern in all the cases that you relied on.

LAWYER: There is no case that holds that you waive this issue of work product...

BAKER: I didn't say there is. But their argument in this case is that shows that you had the opportunity to bring it up then and should have.

LAWYER: We had the opportunity. In the *First Wisconsin* case, which is their principal case that they rely on, the party trying to get access to the work product is the one that made the motion. And in fact, if you will go through those cases and look at them in about 1/3 of them, the party trying to get access to the work product made the motion. In some of them, the court sua sponte dealt with it in addition to dealing with...

BAKER: But in every case except one it was when the disqualification was going on before the issue was resolved by the TC on disqualification. So why doesn't that make it a problem for you on their waiver argument?

LAWYER: Because none of those cases are saying that if it hadn't happened that way, it would have been waived. There was no law in Texas at the time that said, for sure they couldn't get the work product, that's why I'm here.

PHILLIPS: Assuming it's just a brand new question if you were fully trying to protect

your client's position, why didn't you seek some type of temporary order about discussion of this, or giving it away to some new lawyer, and why wouldn't it be better to have it resolved so that this case could start moving to some sort of conclusion? Why shouldn't we find waiver at this juncture even if there's no precedent?

LAWYER: Because we would say that it was unclear whether or not the work product would go anyway, that we should not be required to presume that counsel if disqualified would turn over the work product to somebody else.

PHILLIPS: First of all if the clients - the client owns all these records. If the lawyer is disqualified, the client has to have some representations very quickly.

LAWYER: Well that's true.

PHILLIPS: That just seems inevitable if you win this issue is going to be brought to the court.

LAWYER: I guess what we would say is that in a situation like this where it wasn't the clear law to find a knowing intentional relinquishment by my client of a known right on the assumption that we should have presumed that counsel would go around and say, Oh well we might be disqualified, let me go give this to somebody else.

PHILLIPS: Well let's not call it waiver. Let's call it single action. Not bringing piecemeal special proceedings. Why isn't there some real benefit to that type of rule for the TC and for us?

LAWYER: I can see the point on that, but I think to penalize my client when there could not in my view had been a knowing intentional relinquishment of a known right when the law was not even written on this.

JUDGE: The hearing on the record in the TC on the document passover lasted a couple of hours. I assume the original disqualification hearing lasted a couple of hours too. If you were writing a rule does it complicate the disqualification to say, and you also before the judge decides that have to have a hearing on whether the documents go or not in the case?

LAWYER: I think you could write that kind of a rule. But the rule that I'm suggesting is going to turn on the basis for disqualification. In other words, I'm saying there is not a per se rule. I'm saying that just because somebody is disqualified doesn't mean you turn the work product - you can't turn the work product over. It's only where the disqualification is based on a confidence. So if I had as one of my grounds for disqualification is confidence, I suppose you could write a rule that says, if that's one of your grounds then you better move at the same time. But of course, I don't

know if the judge is going to accept that ground.

BAKER: What if at the time you raise it and in this case after the fact of disqualification every document that you claimed was confidential or is now in the public domain for one of three reasons: it was filed with SEC, it was given to the other side of discovery, or it was introduced at the trial. How does that affect your argument?

LAWYER: I would say that if it's in the public domain you could write a rule that says they could have it. What we are really trying to protect here is the core type work product. It's the game book. We don't want the blue guys to be able to coach the new team with their game book. That's what we are trying to avoid.

BAKER: In other words, I guess you call it the trial note book?

LAWYER: Right. That's another way to put it. But I can't suggest to you fairly a rule that says draw the line at evidentiary privileged core work product, because I know that for purposes...

BAKER: Even if we draw a line, what's the answer to the fact that assuming every document that you say was confidential in the first go round, is in the public domain because it's either SEC filed in the trial or given to them in discovery, and it's not clear from the first Epic, nor clear at all here on what privileged documents Judge Tyson ordered and whether y'all challenged that order by Judge Tyson. Did you challenge that?

LAWYER: No. We tried I think on mandamus and failed. You see that's the work product from matter 1. That gets confusing when they argue this on the other side. But that's the work product from matter 1 that we think she erroneously said the blue guys could have. But I'm talking about all of the work product in matter 2. I'm talking about the blue guys' game book. That's what I'm really trying to avoid...

BAKER: What's the blue guys' game book made up of? Everything that they got from Judge Tyson?

LAWYER: It's all their strategy. It's their impressions. It's everything that would be on the core work product.

ABBOTT: And why can't we have the judge review all of that in camera?

LAWYER: It would be very easy for me to say, just write a rule that lets the judge get in the briefcase and go through it document by document. But I think that's a bad rule for these reasons. First of all, your cases have said that the party that has the problem about trying to protect his confidences is not required to come in and give a list of the confidences. And furthermore - so who

is going to get with the judge and when he goes in the briefcase and say, Judge, this is what you should look for. It's not going to be my client, because I'm not supposed to have to divulge the confidences. It's not going to be successor counsel becuase he doesn't know what they are presumably.

PHILLIPS: That's always a problem in an ex parte judicial review.

LAWYER: Right. But normally an ex parte is based on some non ex parte motions or arguments that are made to the judge. And my point is who is going to be arguing to the judge on what to take out of the briefcase. Do you know who it is going to be? The disqualified lawyers.

BAKER: Doesn't the same thing happen when you have a hearing on a privilege objection?

LAWYER: That's true. And if you wanted to limit this rule to core work product - but the problem with that is I think it's inconsistent with the rest of your cases that say, that what gets protected under the confidences is more than just what's privileged. And frankly, I think that's where the majority of *First Wisconsin* went off the rails.

JUDGE: Could you explain that theory in a little bit more detail why discoverable work product, work product that's not core work product, therefore, presumably does not contain the mental impressions and thoughts of the attorneys. Why that is tainted with the confidences gained from the prior _____?

LAWYER: I could prepare something like a pleading and the reason I write the pleading the way I write it is because of some secret that I know that the former client told me. Now that pleading is not core work product. But I wouldn't have written that pleading the way I wrote it except for the fact that I've got the secret. I'm just trying to get an example of a situation where the confidences that you're trying to protect are beyond what's privileged under the evidence rule. And that to me, is the difficulty here.

PHILLIPS: Some of us had a little trouble with the waiver argument in the last case. We finally bought your argument that it was not apparent at first that the counsel was going to have to be disqualified because of the way they structured their arguments. It wasn't at all clear that they were going to be attacking - that they weren't going to be attacking what Johnson & Gibbs had done. It was going to be another claim. And real close to trial when it became apparent that it was different that's when your grounds for disqualification came up. If that's true, how about all of the records that were generated before this change in strategy and why should they_____.

LAWYER: That's Tab 4. This is another limitation that I would suggest on the rule, which is that the work product had to have been created during a time period when the disqualifing

situation existed. But what you all wrote in Epic 1 when you were talking about was their a wavier in Epic 1, you were writing about when did we have notice or when did the trial judge have had adequate notice that these matters really were substantially related. And the reason I say it like that is that the question of attack on work product is a subset of substantially related. The comments to rule 109 say that. They flat say that. They say attack on work product that's really a subset of substantially related. In Epic 1 when you said when should our side have had notice that they were substantially related, or when should the judge have been able to tell, and you said well that didn't happen till trial, because that's when they attacked the work product. That was a subset of substantially related. That's why the opinion in Epic 1 is written the way it is, which is quoted on Tab 3 where we quote part of the opinion. And what did you all write? You said, this is a situation where there is a genuine threat exist that the lawyers could divulge confidences. So I would argue to your honor that attack on work product is part and parcel of substantial relationship. And to answer your question specifically, the waiver point in Epic 1 went to when did our side have notice, so that they shouldn't have waived it, when did they have notice of the substantial relationship, and you wrote, not till trial. But that doesn't mean that once we had notice, that the substantial relationship did not exist the whole time, the threat of confidence divulging in this case was from the first time matter 2 started being worked on. As soon as the red guys went over there and teamed up with the blue guys and the blue guys started working on matter 2, there is a threat of disclosure.

I was concerned that the waiver analysis in Epic 1 would seep over into this case and confuse the issue of when did the substantial relationship exist for purposes of what I think has to be part of your rule, which is that the disqualifying situation had to have existed when the work product was created. You're not going to just throw out all of the work product. And some of the cases do that.

* * * * *

LAWYER: I represent Ken George. With respect to why didn't we ask in the TC to prevent the transfer of the work files, we did. We asked for such other relief to which we are entitled. The right to prevent the transfer of files is so bound up with the disqualification it is a ...

BAKER: With undue respect to that statement having read the *Epic* record in depth the first go round, I don't think I could ever gleam that that's what you were asking for for a prayer for relief for such other as may be available, because it certainly doesn't appear in any transcript or any written motion that that's what you were asking for.

LAWYER: The consequence of disqualification when a lawyer is presumed to have confidences, the consequence is that that work file is in _____ with those confidences and it can't be transferred. Just like we didn't ask the court to say don't...

BAKER: Then why if you knew all of that then why didn't you say it instead of leaving

it to conjecture in a general prayer, the relief?

LAWYER: I don't stand here saying that we knew that then. I don't claim that at all.

BAKER: But the other side is standing here saying under the way these cases developed, you should have brought it up then, and because you didn't do it, you don't get a right to raise it now. Whether you agree with that or not, that's what they are saying.

LAWYER: If the law did exist that that is a consequence of disqualification, then by asking for disqualification we asked for it. Just as we didn't say - your order was don't le McKool Smith and don't let Jordaan, Howard and Pennington continue this case. We didn't also say, your honors don't let some of those lawyers leave and create a new firm and bring the case. Your honors, don't let those lawyers sit on the sidelines and continue to coach. We didn't ask all of those things either. We didn't waive those things. We get that as a consequence of asking for disqualification. And so the waiver issue is false. It's a false issue.

JUDGE: You agree, we are not here talking about pleadings or trial transcripts, or anything in the public record?

LAWYER: That's right, we are not. They will get the pleadings, they will get the depositions, numerous depositions that have been taken in this case, they will get everything that has been filed.

OWEN: What about summaries of - or indices to documents, paralegal summaries, and depositions, things that could have cost hundreds of thousands of dollars of non-lawyer but paralegal time?

LAWYER: The difference if you are going to draw a line between core work product and regular work product, you could do that. But there are cases that say, Let's don't draw the line at partner and associate, let's don't draw the line at partner and case clerk because case clerk is under the direction of the partner. And so everyone who works on the matter is presumed to have that confidential information. And so if it's work product, then it can't be transferred. That's the line that you can draw.

JUDGE: Well it makes sense to me to draw the line in core work product. Tell us why we should not draw the line there?

LAWYER: The only reason I wouldn't draw it at core is because there's a difference - I think I know the difference between core and non-core, and I think judges do too. But there are going to be fights about that.

JUDGE: Isn't that a much more workable approach since the judges in the state are familiar with a concept if we were to adopt an approach that required an in camera review, that would make it much easier to apply?

LAWYER: That's right. If the rule is that the judge needs to say that core work product can't be transferred, that is a workable rule.

O'NEILL: But isn't there a significant amount of core work product that doesn't involve an _____ of confidences?

LAWYER: No, not under the cases as they've developed. Because a lawyer - we're talking about the lawyer's mind, a lawyer has got the confidences in his or her mind. Those confidences can't help but seep into the work produce. You can't really draw a line between a lawyer and lawyer's work product.

O'NEILL: In a disqualification case that's not based upon confidences, there's no problem of turning over work product?

LAWYER: That's right.

O'NEILL: And this is a very large and complex case, and only a piece of it involves confidences from my understanding of the case. So what would be wrong with turning over work product that doesn't involve confidences?

LAWYER: That's what Ms. Yates was saying. For example, if the lawyer is a witness or a lawyer had acted as an intermediary, or the lawyer became incompetent, there wouldn't be any problem with the work product here. What we're talking about in this case and what this court found was that there was a genuine threat because of the substantial relationship between the representation in the first instance and the lawsuit against my client, that there's a genuine threat that my client's confidences were being disclosed. And so since the lawyers had that genuine draft, then that went into their work product.

O'NEILL: But aren't there issues that involve work product that wouldn't involve confidences? For example, attorney's fees. Couldn't the lawyer do some work on recovery of attorney's fees, internal memorandums, their theory on how they are going to put that case on? What would be wrong with transferring that work product over?

LAWYER: What you've asked that judge to do in that case then is to try and look at all of the core work product and determine what has confidences in it and what doesn't. And the judge can't be expected to do that because the judge doesn't know my client's confidences. I don't have to reveal my client's confidences. I shouldn't be expected to reveal my client's confidences. And

the other side can't argue against it either. That is why you have the irrebuttably presumption. You don't put the burden on me to go to the disqualified lawyers and say these are the confidences you have and that's why you should be disqualified. There's an irrefutable presumption that they got that. And I'm saying now if they've got that, if they are in their mental processes, then that is what work product is. It's the proof fruit of those mental processes.

BAKER: But that presumption doesn't exist until you show substantial relationship or some other part of 109.

LAWYER: You're exactly right. Substantial relationship has to exist.

BAKER: If it's not out there first and then you find something else. You get the benefit of that presumption for the very reason you just said, and that you shouldn't have to reveal AZnthose confidences in getting a lawyer disqualified.

LAWYER: That's right. Just like we couldn't go and say, the McKool Smith lawyers had the following confidences and that's why they should be disqualified, we shouldn't be required to go and say they have it in their work product.

BAKER: What is your viewpoint about when the rationale for your motion to disqualify the two firms arose vis-a-vis disparagement of work product? As I understand Ms. Yates, she and her client didn't know about until the trial started. You're there too?

LAWYER: That's when we saw it. I was there. We raised the motion during trial. And that was the first time we saw it.

BAKER: So would it be then under the argument made by Ms. Yates, you have a cutoff date that anything that was produced before y'all realized it was a work product problem, would not be covered under your request of no transfer for work product to the new firm?

LAWYER: The issue is not when we discovered the conflict, but when the conflict existed. In this case since the court said that they cases were substantially related, it was there all the time.

BAKER: Well then under that statement, y'all knew about it in Sept. 1994, as I recall, because that's when you and co-counsel first brought this to the attention of the two firms didn't you? And so you had knowledge the whole time?

LAWYER: And the court disagreed and this court agreed that it wasn't obvious at that time.

BAKER: No, they just agreed there was no waiver of your right to file a disqualification motion, not that it wasn't there.

LAWYER: All I'm saying is that the time when you determine what work product can be transferred and what work product can't, is when the firm is laboring under the taint. Whenever the firm is disqualified that work which is created during that time period ought not be transferred. If there is a time period where a firm did a lot of work, 2-3 years of work, and then a tainted lawyer comes over to them and that firm then is disqualified, the work that they did for 2-3 years that's okay, you can transfer that. Only that work that was done while they labor under the disqualification, that is tainted, irrebuttably as a matter of law.

LAWYER: But in this case there was no - it was at the June trial